SUPREME COURT, U. S.

JUN 26 1961

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 180

GUSTAVE B. GARFIELD,

Petitioner,

v.

EDMUND PALMIERI,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

GUSTAVE B. GARFIELD,
Attorney for Petitioner pro se,
122 East 42nd Street,
New York, N. Y.

THE REPORTER COMPANY, INC., NEW YORK 7, N. Y.—REctor 2-6978—1961

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner, Gustave B. Garfield, an attorney and counsellor at law, in good standing for upwards of 37 years, admitted to the bar of the State of New York in 1923, to the United States District Court for the Southern District of New York in 1924, to the bar of this court in 1939 and to the United States Court of Appeals, Second Circuit, in 1943, respectfully prays for a writ of certiorari to the United States Court of Appeals, Second Circuit, for review of a judgment, entered in the above cause on May 1, 1961, which affirmed a judgment dismissing the complaint of your petitioner on the opinion of Bartels, U. S. D. J., below.

Opinion Below

The *per curiam* opinion of the United States Court of Appeals simply states "The order is affirmed on the opin-

ion below." The opinion of Bartels, U. S. D. J., is set forth at length at pages 67a to 73a of the Appendix to the Appellant's Brief at the United States Court of Appeals.

Jurisdiction

The decree of the United States Court of Appeals sought to be reviewed was entered on May 1, 1961. The jurisdiction of this Court is predicated upon Section 1984 and Section 2101 of Title 28 of the United States Code.

Summary and Short Statement of Matter Involved

As above recited your petitioner is an attorney in good standing, and has been in good standing for upwards of 37 years (App. 3a).

The respondent, Edmund Palmieri, is a Judge of the United States District Court for the Southern District of New York (App. 3a).

The jurisdiction of the United States District Court for the Southern District of New York was invoked by the plaintiff in said action to obtain a declaratory judgment under Section 2201, Chapter 51, Title 28, U. S. Code, to remedy the violation of the plaintiff's civil rights protected by Section 1343 of Title 28, U. S. Code, and the proceedings in vindication of civil rights afforded to plaintiff by Section 1988 of Title 42, U. S. Code, as well as that portion of the Fifth Amendment to the United States Constitution which provides that no person shall be * * * deprived of life, liberty or property without due process of law (App. 3a).

The statutes involved in the District Court were as follows:

Title 28, U. S. Code, Section 1343, provides in pertinent part:

Sec. 1343. *Civil rights and elective franchise.*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person.

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights including the right to vote.

Title 42, U. S. Code, Chapter 21, captioned Civil Rights, provides in pertinent part as follows:

Sec. 1988. *Proceedings in vindication of civil rights.*

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and *Title 18, for the protection of all persons in the United States in their civil rights,* and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenders against the law, the common law as modified and changed by the constitution and statute of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Title 18, U. S. Code, for the protection of all persons in the United States in their Civil Rights, provides under Section 241 thereof:

Sec. 241. *Conspiracy against rights of citizens.*

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege se-

> cured to him by the Constitution or laws of the United States or because of his having exercised the same * * *.
>
> They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

Title 28, U. S. Code, Chapter 151, Section 2201, captioned Declaratory Judgments, provides:

> Sec. 2201. *Creation of remedy.*
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights, and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Since the month of October, 1957, the petitioner, Gustave B. Garfield, was and still is the attorney of record in an action now pending in the United States District Court for the Southern District of New York, File No. 125-309, wherein one Dave Fleischer is the plaintiff and A. A. P., Inc., and others are defendants. In said action the plaintiff Dave Fleischer sought to disqualify his former attorney, Louis Phillips, from appearing in said action and representing some of the defendants therein because of the prior representation of said Dave Fleischer by Louis Phillips upon substantially related matters and to further enjoin two additional former lawyers, Robert Benjamin and Arthur Krim, from acquiring an interest in the subject matter of the litigation. The application of the said Dave Fleischer was denied at the United States District Court by Judges William B. Herlands and the defendant Edmund Palmieri. The plaintiff in said action appealed to the United States Court of Appeals for the Second Circuit from the orders of dismissal which latter court

dismissed the appeals upon the ground that the orders were non-final and that it lacked jurisdiction to hear the appeals on the merits in consequence. The opinion of the said court is reported in 264 F. 2d 515 (2d Cir. 1959). In the ultimate paragraph of his opinion dismissing the appeals for lack of jurisdiction Judge Clark of the U. S. Court of Appeals added by way of *dictum* the following paragraph, out of which stems the nub of the controversy between petitioner and respondent:

> "Even though the case thus cannot be accepted on the merits, we have necessarily had to explore them to reach our conclusion and because conduct of members of the bar has been so severely questioned, we note our concurrence with the conclusions of the two district judges that respondents have done nothing improper. *The strictures are unjustified and unworthy.*"

In July, 1959, the law firm of Phillips, Nizer, Benjamin, Krim & Ballon, acting as attorneys for defendant Paramount Pictures Corp. in said action of Dave Fleischer vs. A. A. P., Inc., *et al.*, brought on a motion in said action to dismiss the complaint before the respondent Judge Palmieri. During the oral argument of said motion, one Shainswitt, a member of the law firm of Phillips, Nizer, etc., stated that the petitioner, Gustave B. Garfield, had been rebuked by the United States Court of Appeals. As observed by one Alfred Wasserstrom, an attorney then present in court representing another defendant, the remark "was and is irrelevant to the issue then before your Honor (Judge Palmieri), an issue raised by the still pending motions addressed to the pleadings" (p. 61a App).

Thereupon your petitioner rose to what he termed a "point of personal privilege" and objected to the statement made stating that it was false in fact and slanderous, that the remark which Shainswitt referred to was *obiter dictum*, that it referred to the plaintiff in said action, Dave

Fleischer, and not to the petitioner herein, and delayed the hearing of the motion on the merits (App. 5a).

Respondent herein, Judge Palmieri, then stated in open court that he believed that your petitioner had been rebuked by the Court of Appeals.

Thereupon there was filed by the plaintiff in said action, Dave Fleischer, an affidavit of bias and prejudice against a party to said action under Title 28, U. S. Code, Section 144, upon the grounds that the said plaintiff Dave Fleischer could not receive a fair hearing before the respondent Judge Palmieri and such affidavit contained the certificate of good faith required by Section 144.

The affidavit of bias and prejudice is set forth at pages 52a to 54a of the Appendix.

Instead of taking the affidavit of bias and prejudice at face value, Judge Palmieri took the affidavit of Shainswitt, who had initiated the slanderous statements, in opposition to the application and tried not only the issue of good faith but the very fact that the *dictum* of Judge Clark was addressed to petitioner (see opposing affidavit of Shainswitt, pp. 55a to 59a of Appendix).

Judge Palmieri then overruled the affidavit of bias and prejudice and filed an opinion in which he uttered the libelous matter of and concerning your petitioner, which petitioner complains about in the action as having been uttered without jurisdiction, oppressively and under color of official authority thereby damaging the plaintiff in his reputation as an attorney at law and injuring the plaintiff in his civil rights guaranteed to him under the Fifth Amendment of the United States Constitution. The petitioner by this action seeks only to have the following remarks expunged from the records of the United States District Court as constituting a violation of his civil

rights and of his constitutional rights aforesaid. The pertinent parts of the said opinion are as follows:

> "*Palmieri, J.* Before turning to the merits of the motions before the court, plaintiff's application to disqualify the Court on the ground of Personal bias and prejudice * * * against him must be discussed. The application was made under the following circumstances. During oral argument counsel for one of the defendants herein stated that the Court of Appeals in another aspect of this case[1] had rebuked plaintiff's counsel.[2] Plaintiff's counsel rose to what he termed a 'point of personal privilege' stating that the remark referred to was *obiter*, that it was not concurred in by the majority of the Court of Appeals, and that it was addressed to plaintiff and not to counsel. The Court stated its belief that counsel had been rebuked.
>
> "The application for disqualification followed. The oral argument was then adjourned to permit plaintiff's counsel to file the affidavit required by 28 U. S. C. §144 (1952). The affidavit was filed and, after consideration, the Court advised counsel of its intention to deny the application, and to advert to the matter when the opinion on the motion was handed down. The oral argument was then concluded.
>
> "The affidavit recites the occurrence on the oral argument as set forth above, repeats counsel's interpretation of the Court of Appeals remark, and states that counsel feels that he and his client cannot receive a 'fair hearing' if the Court believes that counsel was rebuked by the Court of Appeals. *It may be that the remark was dictum,*

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[1] *Fleischer v. Phillips*, 264 F. 2d 515 (2d Cir. 1959), dismissing appeals from *Fleischer v. A.A.P., Inc.*, 163 F. Supp. 548 (S.D.N.Y. 1958), cert. denied *sub. nom. Fleischer v. Benjamin*, U. S. (1959). The opinion dealt with plaintiff's appeals from orders of this Court refusing to disqualify counsel for certain of the defendants on the ground that they had formerly represented plaintiff in matters relevant to this litigation.

[2] "The strictures (leveled against defendants' counsel) are unjustified and unworthy." 264 F. 2d at 518.

in that it was not necessary to the decision dismissing the appeals[3] *but that does not make it any less a rebuke. Indeed, it is more forceful if the Court saw fit to make it although it was not required. The opinion of Chief Judge Clark was the opinion of the Court*[4] *and the remark was plainly addressed to counsel and not to plaintiff.*[5] *It may be that actions of a litigant have been termed 'unworthy' but I cannot recall such a use of the word and I know of no formulated standard by which litigant's conduct is measured. There is a well-known standard for professional conduct, however, and it is not unusual to term violations of that standard 'unworthy' of members of the profession.*[6] Moreover, assuming that the Court's construction of the Court of Appeals remark is in error, such error is not a ground for disqualification. Disqualification is proper when an affidavit has been filed alleging facts that would tend to show that a judge has a personal 'bent of mind' for or against a litigant. An allegedly incorrect interpretation of a portion of a higher court's opinion does not tend to show such prejudice. *Berger v. United States*, 255 U. S. 22, 33-34 (1921); *Fosier v. Medina*, 170 F. 2d 632 (2d Cir. 1948), cert. denied 225 U. S. 909 (1949); *Knapp v. Kinsey*,

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[3] It should be noted, however, that immediately before making the remark quoted in note 2., *supra*, the Court of Appeals said "(e)ven though the case thus cannot be accepted on the merits, we have necessarily had to explore them to reach our conclusion (that the appeals must be dismissed); and because conduct of members of the bar has been so severely questioned, we note our concurrence with the conclusions of the two district judges that respondents have done nothing improper." 264 F. 2d 517-518.

[4] Judge Gibson in the first sentence of his concurring opinion, stated that he concurred "fully in Judge Clark's opinion dismissing these appeals." 264 F. 2d at 518.

[5] "The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instruction." A.B.A. Canons of Professional Ethics, Canon 31. "(The lawyer) must obey his own conscience and not that of his client." A.B.A. Canons of Professional Ethics, Canon 15.

[6] See e. g., A.B.A. Canon's (*sic*) of Professional Ethics Canon 7; Canon 22.

> 232 F. 2d 458, 466 (6th Cir.), cert. denied 352 U. S. 892 (1956); *Cole v. Loew's, Inc.*, 76 F. Supp. 872, 876-877 (S. D. Calif. 1948). Disqualification of a judge upon an affidavit such as has been filed here would not be consonant with a proper disposition of the Court's business. See *United States v. Valenti*, 120 F. Supp. 80, 83, n. 2, and text thereat (D.N.J. 1954); cf. *In re J. P. Linahan, Inc.*, 138 F. 2d 650 (2d Cir. 1943). The affidavit does not allege facts within the requirements of 28 U. S. C. §144 (1952). The application for disqualification is, accordingly, denied."

There is not and cannot be the slightest doubt that the opinion of respondent Judge Palmieri of which complaint is made was and is false, malicious and libelous. There is not even a *prima facie* denial interposed by the respondent Judge Palmieri, nor has there ever been any attempt on the part of the respondent to plead the truth as a defense to the action. Instead, the Assistant United States Attorney in charge, one James S. Fitzsimons, interposed an affidavit in support of the motion for judgment in which he relied entirely on the defense of judicial privilege. In said affidavit he said:

> No action lies against a judicial officer for an act performed in the due course of his judicial duties. Judges, from time immemorial, have been immune from such actions. The rule cannot in good conscience or order be otherwise, if it were a judicial officer in exercising the authority vested in him would not be free to act his own convictions without apprehension of personal consequences to himself (App. 17a).

The opinion of Judge Bartels, written in the United States District Court, upon the basis of which the U. S. Court of Appeals affirmed, adopted as one basis for dismissal the foregoing argument of the respondent that since he had jurisdiction, his defense of judicial immunity is impregnable. On the other hand, he held that if he did

not have such jurisdiction respondent would no longer be acting in a governmental capacity and hence his individual conduct would not constitute a violation of the Fifth Amendment (Opinion, pp. 72a and 73a App.).

Judge Bartels further held that while the provisions of the United States Code upon which petitioner relied for jurisdiction in the United States District Court did not apply, that the provision of the Fifth Amendment which was invoked by petitioner did apply and vested Judge Bartels with jurisdiction (App. 70a).

> "In a nutshell, plaintiff claims that his right to practice law, which is his means of earning a livelihood, has been seriously impaired by the Judge's allegedly false opinion which he states was rendered without jurisdiction and that such action is tantamount to a deprivation of property without due process.
>
> "A complaint so drawn as to seek a recovery for an invasion of plaintiff's constitutional rights vests jurisdiction in this court and enables it to decide whether or not the claim has any merit."

The Questions Presented

1. Whether on the filing of an affidavit of bias and prejudice clearly sufficient on its face, the United States District Judge against whom it was directed had the right to take affidavits in opposition thereto and try the matters on which the application to disqualify was predicated?

2. Whether the United States District Judge against whom the affidavit of bias and prejudice was directed was not ousted of jurisdiction upon the filing of said affidavit of bias and prejudice under Section 144 of Title 28, U. S. Code, and required to refer the matter before him to another Judge?

3. Whether the filing of the opinion in which the respondent libelled the petitioner and caused the same to be filed as a public document did not violate the petitioner's civil rights and constitutional rights not to be deprived of life, liberty and property without due process of law under the Fifth Amendment and if so was not the petitioner entitled to relief by way of declaratory judgment to strike said libellous matter from the record of the United States District Court for the Southern District of New York?

4. Assuming that the said acts of the respondent were done by him when he lacked jurisdiction because of the timely filing of an affidavit of bias and prejudice under Section 144, Title 28, U. S. Code, whether he was immune from suit to vindicate the petitioner's civil rights because he would no longer be acting in a governmental capacity and whether his individual misconduct would not constitute a violation of the Fifth Amendment, against which violation petitioner was entitled to relief by way of declaratory judgment?

5. Did the United States District Court for the Eastern District of New York acquire jurisdiction of the cause of action for a declaratory judgment in this action to vindicate the violation of the petitioner's civil rights by the respondent under color of his office as a Judge of the United States District Court under the provisions of Title 28, Sections 1343 and 2201, U. S. Code, and also Title 18, Section 241 as well as Title 42, Section 1988 of the U. S. Code, by virtue of the Fifth Amendment to the United States Constitution?

The Reasons Relied on for the Allowance of the Writ

Petitioner respectfully urges as the reason for the allowance of the writ that the United States Court of Appeals, Second Circuit, in adopting the opinion of Judge

Bartels, has decided an important question of federal law which had not been but should be settled in this court and has in addition decided a federal question in a way which is in conflict with the applicable decision of this court and has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by the lower court as to call for an exercise of this court's power of supervision.

(a) The receipt of affidavits in opposition to the motion to disqualify and the trial of the factual issues and the issue of good faith by Judge Palmieri on the motion to disqualify was a clear violation of his duties as a District Judge to accept the facts in the affidavit and the statement of good faith without dispute.

The mandate of Section 144 of Title 28 of the U. S. Code is clear that the Judge with whom the affidavit of bias and prejudice is filed shall proceed no further therein but another Judge shall be assigned to hear such proceeding. Furthermore it gives the Judge whose disqualification is sought no right to pass upon the questions of fact or of the good faith of the counsel who certifies that the affidavit is filed in good faith. The section provides:

> "Sec. 144; *Bias or prejudice of judge.*
>
> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, *such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.*
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one

such affidavit in any case. *It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.*"

Contrary to the clear mandate of Section 144 Judge Palmieri permitted an affidavit to be submitted in opposition to the motion for disqualification by Seymour Shainswitt, the originator of the slander, in which the factual matter set forth in the affidavit and the good faith of the petitioner herein was questioned and an utterly scandalous matter was further injected into the application having nothing whatsoever to do with the case of Fleischer v. A. A. P., Inc. (see the complete affidavit for the sordid and intemperate plea of Mr. Shainswitt at pages 55a-59a of the Appendix). In other words Mr. Shainswitt with the consent and approval of Judge Palmieri set about to try not only the facts upon which the affidavit of prejudice were predicated but the very good faith upon which it was filed, by resort to extraneous, highly prejudicial and scandalous matters not at all pertinent to the inquiry before Judge Palmieri.

(b) Petitioner showed by the letter written April 15, 1959, by one Alfred Wasserstrom, one of the attorneys in the litigation of Fleischer vs. A. A. P. Inc., that the highly prejudicial and collateral controversy was injected into the matter sub judice on the instigation of Mr. Shainswitt and that it had nothing to do with the motion to be determined by Judge Palmieri to dismiss the complaint properly before him (pages 60a-62a of Appendix).

The evidence submitted by the petitioner herein in opposition to the motion to dismiss the complaint on the grounds of judicial immunity of Judge Palmieri showed that both Judge Palmieri and Mr. Shainswitt between them injected the highly prejudicial collateral and scan-

dalous matter into the motion to dismiss which properly came before Judge Palmieri. To substantiate this assertion the plaintiff in this action annexed to his opposing affidavit the letter of one Alfred H. Wasserstrom, an attorney associated with the law firm of McCauley, Henry & Brennan, counsel to the defendant King Features Syndicate, Inc., who was present on the occasion and who said in pertinent part as follows:

April 15, 1959

"Honorable Edmund L. Palmieri
United States District Court
Foley Square, New York, New York

In re: Dave Fleischer v. A. A. P., Inc., *et al.*
Civil 125-309

My dear Judge Palmieri:

• • • I was present in court the day before yesterday when this issue arose during the course of argument of certain motions herein then before your Honor. Consequently, I know exactly what took place, • • •

We had first. Mr. Shainswitt's *tangential remark* concerning Mr. Garfield. We then had Mr. Garfield's objection to that remark on the grounds of personal privilege. Then followed your Honor's interpretation of certain observations, highly critical at least of plaintiff made by Chief Judge Clark in the course of that Judge's opinion on an appeal herein, but *in relation to an issue entirely different from the one then before your HONOR.* Whereupon Mr. Garfield, after stating his disagreement with your Honor's interpretation, but solely on the grounds of such divergence, asked your Honor to disqualify himself from acting further in the case at bar. The nub of the disagreement turned on whether said observation applied not only to plaintiff but also to his attorney."

(c) In permitting proof on the factual matter presented by the affidavit of bias and prejudice and on the good faith of the petitioner in filing the said affidavit, the Circuit Court, which adopted the opinion of Bartels, J., decided the case in a way in conflict with the decision of this Court in Berger v. United States of America, 255 U. S. 22. Upon the filing of this clearly sufficient affidavit of bias and prejudice Judge Palmieri was without jurisdiction to proceed further and he does not receive judicial immunity for a libellous opinion filed by him when he was without jurisdiction.

The leading case of *Berger v. United States*, 255 U. S. 22, makes it clear that the recusant Judge must accept the facts set forth in the affidavit of bias and prejudice as true and that he has no right to dispute the facts upon which the affidavit is predicated, nor may the certificate of counsel that the affidavit of bias is filed in good faith be the subject of trial testing the good faith of counsel. Thus in the *Berger* case Judge Landis, who was accused justifiably of prejudice against the defendants, who were Germans, a deep seated prejudice against all Germans of whatever nativity, American or otherwise, tried to annex the speeches which he had made as opposed to the quotation therefrom of the defendant Berger. The United States Supreme Court rejected this extraneous matter holding that *the District Judge must accept the allegations of the affidavit as true and that only what is set forth in the affidavit of bias and prejudice is material to the issue of disqualification.*

Since this basic and fundamental principle of law was violated by Judge Palmieri by taking scandalous affidavits in opposition to the motion to disqualify and trying the issue of good faith, we believe that the restatement of the basic questions as decided by the Supreme Court in *Berger* is apposite.

Judge McKenna, writing for the Supreme Court, said in the *Berger* case:

> "The basis of the questions is Sec. 21 (Judicial Code) and the primary question under it is the duty and power of the judge—whether the filing of an affidavit of personal bias or prejudice compels his retirement from the case or whether he can exercise a judgment upon the facts affirmed and determine his qualifications against them and the belief based upon them.
>
> "These alternatives present the contentions in the case. *Defendants contend for the first, the United States contends for the second.* The assertion of the defendants is that the mandate of the section is not subject to the discretion or judgment of the judge. The assertion of the United States is that the motion and its supporting affidavit like other motions and their supporting evidence are submitted for decision and the exercise of judicial judgment upon them. In other words the action of the affidavit is not 'automatic,' to quote the Solicitor General, but depends upon the substance and merit of its reasons and the truth of the facts, and upon both the judge has jurisdiction to pass. The answer is therefore precise, and while not in broad compass, is practically of first impression, as now presented. * * * (Page 30) The cases (one being excepted) to the extent they go, militate against the contention of the Government, and they have confirmation in the words of the section (which the court quotes and is substantially the same as Section 144 of Title 28). There is no ambiguity in the declaration and seemingly nothing upon which construction can be executed, nothing to qualify or temper its words or effect. It is clear in its permission and direction. It permits an affidavit of personal bias or prejudice to be filed and upon its filing, *if it is accompanied by a certificate of counsel, directs an immediate cessation of action by the judge, whose bias or prejudice is averred,* and in his stead the designation of another judge. The

exclusion of the one is emphasized by the requirement of the designation of another. (P. 32) * * * the section withdraws from the presiding judge a decision upon the truth of the matter alleged. Its explicit declaration is that upon the making and filing of the affidavit, the judge against whom it is directed '*shall proceed no further therein but another judge shall be designated in the manner prescribed in Section 23 to hear the matter.*' *And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance to the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and if prejudice exists it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes fortified by a presumption and nothing can be more elusive of estimate.* After overruling the motion of plaintiffs for his displacement Judge Landis permitted to be filed a stenographic report of the incident and language upon which the motion was based. We, however, have not discussed it, because under our interpretation of Section 21, it is excluded from consideration.

"We come then to the questions certified and to the *first* we answer Yes, that is that the affidavit of prejudice is sufficient to invoke the operation of the act; to the *second* we answer that to the extent we have indicated Judge Landis had a lawful right to pass upon the sufficiency of the affidavit; *to the third we answer no: That is that Judge Landis had no lawful right or power to preside as judge on the trial of defendants upon the indictment*" (p. 33).

(d) The decision of Judge Bartels (adopted by the Court of Appeals) to the effect that if the respondent Judge Palmieri was without jurisdiction he was no longer acting in a governmental capacity and hence his individual conduct would not constitute a violation of the rights of the petitioner under the Fifth Amendment is a negation of the rights of petitioner not to be deprived of the right to practice law without due process of law.

Judge Bartels ruled as follows:

> "Even if plaintiff be correct and defendant lacked jurisdiction over the subject matter when he made the challenged statement, plaintiff would still find himself between Scylla and Charybdis, since defendant would be acting individually and not within the scope of his duties. Under this hypothesis defendant would no longer be acting in a governmental capacity and hence his individual conduct would not constitute a violation of the Fifth Amendment. This was demonstrated in the case of *Bell v. Hood*, D. C. Cal. 1947, 71 F. Supp. 813, upon remand from the Supreme Court where recovery was sought against certain Federal Bureau of Investigation agents for invasion of plaintiff's constitutional rights. In denying recovery, Judge Mathes said (p. 817):
>
> > "'* * * The defendants are sought to be held as individuals, not as federal officers. But inasmuch as the prohibitions of the Fourth and Fifth Amendments do not apply to individual conduct, the amendments themselves when violated cannot be the basis of any cause of action against individuals.'"

The above decision loses sight of the fact that the act of the respondent Judge Palmieri was an act of oppression committed under color of office. Such an act, if committed by a Judge of the State of New York, would be a violation

of Section 854 of the Penal Law of said state. It is true that it was committed as an individual and not as a Judge sitting in the seat of judgment. It is true that Judge Palmieri lacked jurisdiction, but he has nevertheless perpetuated the libel of petitioner by causing the opinion to be filed and also to be published in Volume 180 Federal Supplement Reports, so that it is available for everyone to see for all times in this country.

In the case of *Dean v. Kochendorfer*, 237 N. Y. 384, the Court of Appeals of New York said:

> "If a magistrate instigates a prosecution before himself without probable cause and deliberately uses the process issued by him therein, not for a legitimate purpose of hearing the case, but to show his authority and to gratify his personal feelings of importance, the act savors of oppression (Penal Law sec. 854) and constitutes an illegal abuse of process. If it may be inferred that the warrant was issued by defendant merely to bring plaintiff into the presence of the magistrate in order that the defendant might lecture and chide him under the guise of judicial action, a prima facie case of abuse of process is well made out."

Were the defendant actually to have entered an order of the United States District Court in which by *ex parte* proceedings he were to have disciplined the petitioner an action in mandamus, directing the expunging of the said order from the court records would assuredly be proper. Such was the holding of the United States Supreme Court in *Ex Parte Bradley*, 7 Wall. 354, where Field, J., writing for the Court, said in pertinent part:

> "The criminal court of the district, as a court of general jurisdiction, possessed the power to strike the name of the plaintiff from its rolls as a practicing attorney. This power of removal from the Bar is possessed by all courts which have authority to admit attorneys to practice. It is a power

which should be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself or a proper regard for the integrity of the profession. And, except where matters occurring in open court in the presence of the judges constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording ample opportunity of explanation and defense. This is a rule of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession as it is when the proceeding is taken to reach his real or personal property. And even where the matters constituting the grounds of complaint have occurred in open court under the personal observation of the judges, the attorney should ordinarily be heard before the order of removal is made, for those matters may not be inconsistent with the absence of improper motive on his part, or may be susceptible of such explanation as would mitigate their offensive character, or he may be ready to make all proper reparation and apology.

"Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of great value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to the family.

* * * * * *

"Without pursuing this branch of the case further, our conclusion is; * * * That they (the judges of the court below) possessed no power to punish him (relator) upon an *ex parte* proceeding, without notice or opportunity of defense or explanation for misbehavior, or for any particular instance of the same generally in his office as attorney of

the court, as claimed in the words of the return; 'irrespective of the doctrine of contempts.'

"The only remaining question is, whether or not a writ of mandamus from this court is the appropriate remedy for the wrong complained of. This question has already been answered by Chief Justice Marshall, who delivered the opinion of the court in *Ex Parte Crane*, 5 Pet. 190. That was an application for a mandamus to the Circuit Court of the United States for the Southern District of New York, commanding the court to review the settlement of several bills of exceptions. The learned Chief Justice observes: 'A doubt has been suggested respecting the power of the court to issue the writ. The question was not discussed at the bar, but has been considered by the judges. It is proper,' he observes, 'that it should be and the opinion of the court announced. We have determined that the power exists.' He then refers to the definition and office of the writ as known to the common law in England, and to the language of Blackstone in speaking of it as follows: '*That it issues to the judges of any inferior court, commanding them to do justice, according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the Court of Kings Bench to superintend all other inferior tribunals and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or the legislature has invested them, and this, not only by restraining their excesses, but also by quickening their negligence, and obviating the denial of justice*'" (376).

Why should not an action for a declaratory judgment lie which would afford to the plaintiff similar relief directing the defendant to strike from the court records such portion of the opinion which is scandalous, libelous, false in fact and which has the same effect in the public mind as if an *ex parte* order of discipline had in fact been entered by this defendant? In the public mind the words rebuke and censure are interchangeable. Assuredly Judge

Palmieri had no jurisdiction to hear any charges of misconduct against the plaintiff, were they to have been filed, since that function is relegated to the Chief Judge of the U. S. District Court for the Southern District of New York (Rule 5, General Rules So. Dist. N. Y.).

Since Judge Palmieri's actions were done under color of office, he is under a duty and obligation to right the wrong which he has done and this court has power to order him to expunge the libelous words from the record which reflect upon the petitioner in his right to practice law, and which were entered by respondent without jurisdiction.

The question then arises as to whether the respondent can obtain immunity from suit for the malicious libel of the petitioner by his own misconduct in first slandering the petitioner in open court, thus requiring the filing of an affidavit of prejudice and bias, and then overrule this affidavit on conflicting affidavits and an assumption erroneous in fact and logic that because he had never heard the word "unworthy" applied to a layman it must necessarily be held that the Court of Appeals used it with respect to the petitioner. Thus the resentment of petitioner at being slandered by respondent is being used by him as a shield for his malicious libel of petitioner.

Abraham Lincoln in his famous address at Cooper Union (February 27, 1860) posed a similar question when he said:

> "You need not be told that persisting in a charge which one does not know to be true is simply malicious slander. * * * A highwayman holds a pistol to my ear, and mutters through his teeth, 'Stand and deliver, or I shall kill you, and then you will be a murderer!' To be sure, what the robber demanded of me was my own and I had a clear right to keep it; * * *."

The Important Constitutional Question Which This Court is Respectfully Requested to Review

This Court laid down the rule as to a Judge's immunity from suit for acts done while sitting in the seat of judgment, in the case of *Bradley v. Fischer*, 80 U. S. 335 (13 Wall.). But it was clearly held by this Court, per Field, J.:

> "* * * A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter, any authority exercised is usurped authority, and for the exercise of such authority when the want of jurisdiction is known to the Judge, no excuse is permissible."

The respondent, Judge Palmieri, conceded below in overruling the affidavit of bias and prejudice that;

> "Disqualification is proper when an affidavit had been filed alleging facts that would tend to show that a judge has a personal 'bent of mind' for or against a litigant." (Appendix 8a.)

There can be no question but that the respondent, in open court and upon an utterly irrelevant matter, having nothing to do with the matter then *sub judice* uttered a false, malicious and slanderous statement of and concerning the petitioner, which induced the filing of the affidavit of bias and prejudice under Title 28, Section 144, U. S. Code, which since it was sufficient, ousted the respondent of jurisdiction (*Berger v. United States*, 255 U. S. 22).

In overruling the affidavit of bias and prejudice the respondent then proceeded to libel the petitioner, thus doubly compounding the evil which the petitioner sought to remedy by the filing of the affidavit of prejudice. Since the affidavit of bias and prejudice was sufficient, clearly the respondent was without jurisdiction to proceed further

in the matter and his filing of the libelous opinion was accomplished by the usurpation of authority over the petitioner in a quasi disciplinary proceeding, the net effect of which was rendition of an opinion which has branded the petitioner as "unworthy" without his ever having been charged with any offense, without a hearing, and without an order of any court disciplining him. (See *Fleischer v. A.A.P., Inc.*, 180 Fed. Supp. 717.) This constitutes a violation of the petitioner's rights under the Fifth Amendment not to be deprived of property without due process as clearly as if he were disciplined without notice of hearing. (See *Ex Parte Bradley*, 7 Wall. 354.) The filing of this opinion by respondent in 180 Federal Supplement merely makes public for all time the shame which respondent has heaped upon petitioner.

The basic question which is submitted to this court for review is whether the judicial privilege from suit which a Judge of the United States District Court enjoys for statements made by him even maliciously, unlawfully and with the vicious intent to harm and degrade a lawyer in the practice of his profession takes precedence over the provision of the Fifth Amendment to the United States Constitution which provides that no person shall be deprived of life, liberty or property without due process of law. The right to practice law has been held to be a species of property, protected by the Fifth Amendment (see *Ex Parte Bradley, supra*). Certainly the respondent is a Constitutional officer, sworn to uphold the Constitution when he assumed the office of Judge of the United States District Court. He should not be permitted to avail himself of a plea of judicial immunity in a suit which is predicated upon the violation of the very constitutional rights of the petitioner which the respondent swore to uphold.

Judge Bartels has held below that the making of the motion for disqualification compelled the respondent to examine the affidavit of bias and prejudice and thus vested the respondent with jurisdiction to examine the affidavit to ascertain whether it was sufficient in law. For this proposition he cites three cases, which are clearly distinguishable from the leading case of *Berger v. United States, supra.*

(1) In *Eisler v. United States*, D. C. Cir. 1948, 170 F. 2d 273, this Court granted certiorari which was later dismissed because the petitioner Eisler fled the jurisdiction and forfeited his right to have his case reviewed by this Court.

(2) In *United States v. Lattimore*, D. C. D. C. 1954, 125 F. Supp. 295, Judge Youngdahl, overruled the affidavit of bias filed by the Government saying:

> "At bottom the affidavit is based upon the virulent notion that a United States Judge who honors and adheres to the sacred Constitutional presumption that a man is innocent until his guilt is established by due process of law had a 'bent of mind' that disables him from the fair and impartial trial to which both the accused and the Government are entitled."

It is a far cry from asking the Court to disqualify itself as did the Government in the *Lattimore* case because it has upheld its Constitutional oath, from the instant case where the District Judge was violating the Constitutional rights of the petitioner and his client by proceeding after the filing of an adequate affidavit of bias.

(3) The case of *Green v. Murphy*, 3 Cir. 1958, 259 F. 2d 591, relied on by Bartels, J., below clearly shows that the respondent, Judge Palmieri, exceeded his jurisdiction by taking opposing affidavits as to the good faith of the petitioner in filing said affidavit of prejudice and of the

basic facts going to establish the fact of bias and prejudice. Chief Judge Biggs, writing for the Third Circuit sitting *en banc* said:

> "It is now settled law that the judge against whom an affidavit of bias and prejudice is filed under Section 144 must himself pass on the legal sufficiency of the facts alleged and that in so doing *he must accept the allegations of the affidavit as true.* * * * *Only what is set forth in the affidavit of bias and prejudice is material to the issue of disqualification. Berger v. United States*, 255 U. S. 22. It follows therefore that only questions of law are presented by the respondent judges refusal to disqualify himself. *There can be no dispute either in the district court or on appeal as to the truth or falsity of the allegations of the affidavit.*"

The petitioner's complaint stated facts sufficient in law to state a claim predicated on the deprivation of the petitioner's constitutional rights not to be disciplined in his right to practice law, and not to be libeled and or slandered as to his conduct as an attorney by this respondent as a Untited States District Judge.

So your petitioner is held to have been the murderer of his own reputation by the very act of taking offense at the vicious slander of himself not only by his adversary Shainswitt but by Judge Palmieri. Such a result makes of a United States District Judge a potential despot, and a vehicle for character assassination who may use the judicial privilege to destroy the very Constitution which he is sworn to uphold.

WHEREFORE, petitioner prays that a writ of certiorari be granted and that the judgment below be reviewed.

Respectfully submitted,

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Attorney for Petitioner *pro se*.